Good morning. My name is Keir Bradford Grey, Chief Defender of the Defender Association of Philadelphia. I want to thank you for inviting me to speak today about race and gender bias in the courts.

It's not news to any of us attending this hearing that that there are, as Bryan Stevenson describes, two criminal justice systems in America. What I think is less known is the assertion that these systems operate with the same disproportionate assumptions and treatment against lawyers and other judges of color as they do litigants in the courtrooms across the city. The issue of race in the justice system is baked into every aspect of the justice system.

While I, as a Black female attorney married to a currently seated Black male judge, have, over the last 20 years, accumulated more than a few experiences to share about racial and gender bias in the courts, I am here today to speak primarily for the people and the communities I serve in Philadelphia—specifically my clients' criminal case outcomes, where racial and gender inequality is observable and quantifiable at every decision point. Further, I respectfully submit that the legislature's most powerful tools to combat racial and gender bias in the courtrooms are not necessarily progressive criminal justice reforms, but rather greater financial investment in indigent defense throughout the Commonwealth, financial incentives for courts to accurately collect and transparently report performance metrics, and racial impact statements to accompany pieces of criminal and youth justice legislation. Plain and simple the reason for the continued systemic disproportionate racial outcomes is because there is no accountability on a system that costs billions of dollars a year and has a high rate of return for those who go through it.

As legislators, I think it's important for you be aware of two misconceptions upon which general operations of the criminal justice system are guided:

1. the presumption that Black men and boys are more likely to commit crimes than anyone else; and
2. the notion that criminal law, in its enforcement or administration is now, or moving forward, should be, color-blind.

The effect these misleading concepts have on the court processes and the outcomes of our clients' criminal cases cannot be overstated. They impact every facet of how the criminal justice system functions - investigations, prosecution, and sentencing. These presumptions are the heart of how little actual proof of wrongdoing is required to justify an arrest, or sustain a prosecution. They inform the courts' assessment as to who should be released during a bail decision, what reasonable suspicion looks like in a motion to suppress, and of course fuel our jurisdiction's addiction to post adjudicatory supervision. And they cannot be cured by well-intended internal efforts by the courts, police, or prosecuting attorneys. You may hear that implicit bias training, initiatives to increase diversity among staff, implementing a formal grievance process, or imposing greater (or less) judicial or prosecutorial discretion in decision making are the keys to eliminating gender and racial bias in the courts. Yes, these are indispensable tools, but inadequate by themselves.

You may also hear the community's demand for a greater voice in deciding for their own neighborhoods what behaviors require a criminal justice response and which do not, which

require a social intervention, and which nothing at all. There are many who look to an alternative to traditional policing, who yearn to create a community driven response to behaviors that cause conflict in their neighborhood. They view arrest and incarceration, because of their criminogenic effect, as a last resort. This movement is driven, in part, by wholehearted belief that the only way to eliminate gender and racial bias in the courts is to remove the overwhelming majority of disputes or behaviors from the jurisdiction of the court.

But until we get there, to a better system of pre-arrest conflict resolution, the most effective method we have to eliminate racial and gender bias in the courts has always been and will continue to be the earnest, skilled, culturally competent and effective representation of individual clients. We need better lawyers. Stronger lawyering provides us the best chance of achieving the type of fair and reliable criminal justice system outcomes we seek.

Let's take for example the case of Michael White - a young, Black man my office, and I personally, represented almost two years ago. Michael was a college student working for a food delivery service over the summer. One evening, while making a delivery in Rittenhouse Square, a luxury neighborhood in the city, he witnessed an escalating situation between a passenger of one car and the driver of an another. When the passenger, a large intoxicated White man exited the vehicle, Mr. White attempted to de-escalate the situation. The passenger made racially charged threats before charging Michael. Fearing for his life, Mr. White stabbed the passenger in self-defense and in a panic discarded his knife and ran. He later, after turning himself in to police, showed them where the weapon had been discarded. The passenger, unfortunately, died as a result of his injuries. Unbeknownst to Michael, the passenger of the vehicle was Sean Schellenger, a financially well established, well-connected real estate developer who had been featured in local news articles in magazines and newspapers. The case captivated the city, and became in many ways a microcosm of racial and class divides.

In the course of representing Michael, my office and I invested countless resources: the time and energy of three experienced homicide lawyers; social workers who allowed us to get a better sense of Michael as a person; paralegals and clerks who worked tirelessly to prepare materials; and investigators who travelled to outside states to interview witnesses and accompany them in their travels to testify, ultimately, as to the victim's propensity for violence. We also leaned heavily on community partners – who provided support to Michael and his family at every turn – including securing the financial resources necessary for his pretrial release.

I cannot overstate the difference it made, as his lawyer, to be able to meet with Michael at coffee shops and my office, instead of the local jail cell, to review his case. The District Attorney's office, upon reviewing the materials we intended to introduce at trial, dismissed the murder charges prior to trial. Ultimately, we were successful in defending the remaining manslaughter charge as well. An outcome we believe was just.

Let's compare Michael's case, to that of Anthony Fletcher, a 65-year old former lightweight boxing champion, who until January of this year was housed in the Department of Corrections serving a death sentence following his 1993 trial for murder. Like Michael White, Mr. Fletcher too claimed that his actions which caused the death of Mr. Vaughn Christopher

were in self-defense. But unlike Mr. White's case, Mr. Fletcher's court appointed attorney failed to properly investigate the claim.

After years of effort by both my office and the federal defender office, a federal court ruled that Mr. Fletcher, who had spent 28 years on death row, did not receive effective assistance of counsel. While Mr. Fletcher raised numerous claims, the most alarming to the federal court was that his self-defense claim was never investigated or properly raised during his trial. On January 21, 2021, Mr. Fletcher entered a no contest plea and was sentenced to 12.5 to 25 years in prison. For the first time since his arrest in the summer of 1992, Mr. Fletcher was released from custody.[1]

Effective, culturally competent lawyering is essential to a fair and reliable criminal justice system. Lawyers must investigate their clients claims, must engage in thoughtful legal research, and must possess the skills and experience necessary to litigate the case properly, including raising claims of racial and gender bias, that cannot otherwise be raised on appeal. This is true in every case, but never more so than in capital cases. But Mr. Fletcher, one of the 33 men at the beginning of 2021 serving death sentences imposed by the Philadelphia courts, simply did not receive adequate counsel. I wish I could say that his was the exception. But, the reality is people like Mr. Fletcher, the group of mostly Black men, sentenced to death in our city in the 80s and 90s[2] were infrequently put in positions to receive adequate counsel. As discussed during the April 8, 2008 Senate Judiciary Committee on Death Penalty cases, the now 27 men currently residing on death row who were sentenced to die in the 80s and 90s received those sentences when my office handled only 20% of death eligible cases. At the time, the court-appointed counsel assigned to represent the remaining 80% of capital cases received a meager flat fee of $1700 plus $400 for each day in court. [3]

To borrow from our former ABAB President, quoting Justice Ruth Bader Ginsburg, well-represented people do not get the death penalty. But equal access to quality representation remains an abstract concept here in Pennsylvania. And without it, issues of race and gender bias in the courts perpetuate and often go unlitigated.

These disparities in resources have ripple effects, not just on the quality of lawyering, but on the very practice of law at every decision point.

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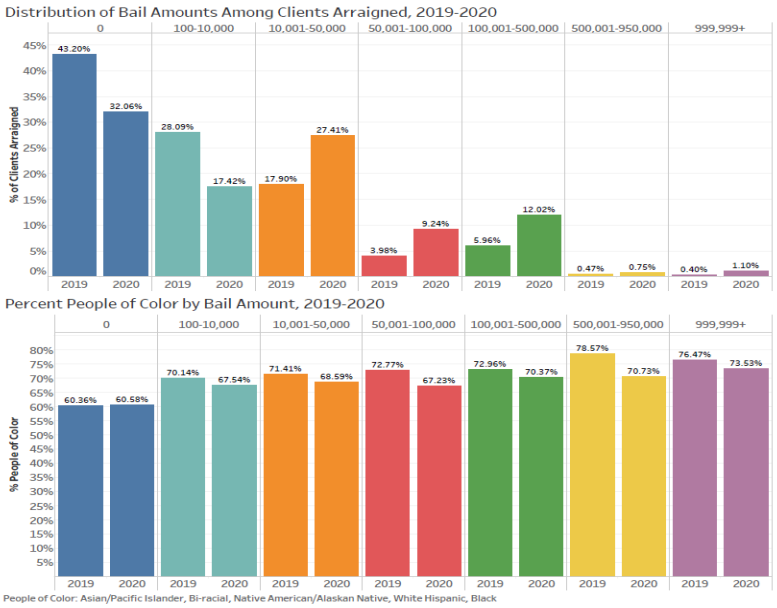
[1] https://www.inquirer.com/news/anthony-fletcher-boxer-murder-death-row-release-larry-krasner-federal-court-appeal-20210121.html

[2] 27 of whom are Black, 2 of whom are Hispanic, 1 of whom is Asian, and 2 White; see Current Execution list on Department of Correction website

[3] See Tina Rosenberg, Deadliest D.A., N.Y. TIMES, July 16, 1995 at 22 (Magazine). Philadelphia represents less than 13% of Pennsylvania's population but over half of the State's death row population. See John M. Baer, Faulkner, Mumia in Mix: State Senate Hearing Set on Moratorium for Death Penalty, PHILA. DAILY NEWS, Feb. 21, 2000, at 7 (noting that, in 2000, Philadelphia is responsible for 55% (126/230) of the state's death row population; 88% (1111126) of inmates put on death row by the Philadelphia district attorney are African American or Latino).



Let's take for example the bail system. Right now, approximately 1175 people, or roughly 25% of the Philadelphia's jail population, are in prison because they could not afford to pay the bail set by the court. This does not include people incarcerated for violations of probation. The pretrial population, people who are presumptively innocent awaiting trial in Philadelphia, where I practice, is overwhelmingly Black, male, and poor.

I should note that both the federal and state constitution prohibit the imposition of financial conditions of bail for the purpose of detention for public safety concerns. It is also disfavored by the ABA and NAPSA standards. It's a practice uniformly viewed as broken on both sides in that it permits people who pose legitimate risks to public safety to buy their release while also resulting in the unnecessary detention of people who cannot pay the price of freedom. In its place, the federal and state constitution call for a transparent preventive detention system. One that requires the court to issue an order to detain or release a person charged when a certain set of circumstances are presented—a model that requires the defendants to receive adequate due process protections, namely that they are represented by counsel, that they have an opportunity to present their own evidence, to test the accuracy of the information offered against them, and to receive speedy trial protections.

Yet the practice of imposing cash bail for the purpose of detaining people who the courts find present public safety challenges persists in courtrooms across Philadelphia, where approximately ¼ of the population resides at or below the poverty line every day. By our last count, the District Attorneys' Office, known nationally as a progressive office, was requesting magistrates to impose a dollar less than $1 million bail in 44% of the cases coming through preliminary arraignment. While magistrates, did not typically grant the extraordinary bail amount, they did impose financial conditions of release in half of the cases in preliminary arraignment. Remember, we do not have a summons process in Philadelphia so this means half of all arrestees are required to pay some amount of money to secure their release immediately following preliminary arraignment. On paper, it would seem the solution would be to abolish cash bail and end, what is commonly referred to as the system of wealth-based human caging.

But without additional safeguards, we risk exacerbating existing racial and ethnic disparities in pretrial detention. Under a preventive detention model, Michael White, for example, would likely have been detained for the months leading up to his trial. And like

thousands of others exposed to even brief periods of detention, he would have been more likely to be convicted, more likely to receive a custodial sentence, and more likely to receive a longer sentence than similarly situated counterparts who were released pretrial[4]. His access to counsel would have been more limited. And he may have felt pressured to accept a negotiated plea that was not in his best interest, or even consistent with what happened, just to be released from prison.

And so, we must view pretrial policy within the framework of the two misconceptions I discussed earlier –misconceptions that work together to create a culture of pretrial detention as well as an addiction to post adjudicatory supervision. Earlier last year, legislation was introduced calling for much needed reforms of our probation system, including caps on the lengths of sentences, opportunities for early release from supervision, elimination of probation "tails" (the imposition of a probation term to follow a successful completion of a parole term), and capped sentences for technical violations of probation.

While the robust provisions of the bill ultimately did not survive the legislative process, I would urge this committee to continue to push for reform by calling on counties to collect and transparently report more robust metrics as to the functioning of their probation systems – including number of probation terms imposed and their length, supervision stratification, alleged violations of probation, sanctions imposed, revocations by race, ethnicity, and gender. As well as metrics related to relative successes in an effort to identify who could benefit from early termination provisions. Conditioning the receipt of state funds on improved data collection and transparent public reporting in pretrial decision-making and probation supervision is a critical component to combatting racial and ethnic disparity in the courts.

But data collection, with financial incentives to support data collection and transparent reporting are an important first step, the final tool in combatting racial and ethnic disparities in the courts begins with including racial impact statements in legislation impacting criminal and youth justice.

Racial impact statements are a tool that allows the legislature to evaluate the impact a proposed legislation will have in creating or alleviating racial disparities prior to the legislation becoming law. Like an environmental or fiscal impact statement, these tools allow the legislature to detect consequences that flow from the legislation. And they require us to incorporate the potential for racial and ethnic disparity at the inception of the legislative process – not as a collateral unforeseen event. Five states (Iowa, Connecticut, Florida, Oregon, and New Jersey) have structures in place for the legislature to prepare and consider racial impact statements. In addition, the Minnesota Sentencing Guidelines Commission develops racial impact statements without statutory guidance. In recent years, legislators from Arkansas, Illinois, Kentucky, Minnesota, Mississippi, New York, Oklahoma and Wisconsin have introduced legislation to adopt racial impact statement policies.

These tools would be particularly useful in the youth justice context, where legislators and other system stakeholders are currently working on a package of reforms to improve the

[4] The Hidden Costs of Detention https://nicic.gov/hidden-costs-pretrial-detention

quality of justice our system offers youth. Racial impact statements could help assess the impact raising the age of prosecution, changing funding structures for community based programming for justice system involved girls, and imposing limits on the use of a detention as a sanction for children serving probationary terms for misdemeanor infractions would have in combatting racial and gender bias in the courts. In Philadelphia, for example, children as young as ten years old are subjected to the process of arrest and initial detention. Recently, a 12-year old boy was arrested and charged with involuntary manslaughter when his 5 year-old cousin accidentally shot and killed the tween's 9 year old sister. All of the children had been left home unsupervised at the time of the little girl's death. While the tween was a 'defendant' in this case, he is also a victim in the abuse and neglect proceeding filed against his father. In Philadelphia, our courts sometimes impose a custodial sentence upon the young ladies we represent because there are insufficient community based programming in the city for our girls. It is unlikely that this problem is unique to our city. Current funding structures that condition funding for community based alternatives to detention on the number of students served, insufficiently sustain year-round programming when the population of girls who need the service ebbs and flows. This means our girls are often treated differently that our boys because there are fewer sustainable programming options in the community for them a fact that a racial impact statement might have brought to light prior to the implementation of the law. Finally, our latest data analysis suggests an alarming number of Black and Brown children are placed in detention following relatively minor violations of probation for misdemeanor offenses – a practice that is both harmful to children and cost inefficient.

And so we must continue to carefully re-examine our laws, policies, and practices and correct those that have led us to the situation we are in today. As the Chief Executive Officer of the largest criminal defense law firm in the state, I submit to you that well-funded criminal defense attorneys, a statewide mandate and financial incentives to improve uniform data collection and transparent reporting requirements by the counties, and a legislative commitment to assess the impact proposed legislation will have on communities of color, prior to implementing new law, are key components to building a more reliable and just criminal legal system.

Thank you for your time and consideration today.